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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of the Commission's Rules)
Regarding the 37.0-38.6 GHz and 38.6-)
40.0 GHz Bands)

ET Docket No. 95-183
RM-8553

Implementation of Section 309(j) of the)
Communications Act -- Competitive)
Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz)

PP Docket No. 93-253

To: The Commission

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COMMENTS OF DCR COMMUNICATIONS, INC.

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March 4, 1996

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SUMMARY

DCR is a small, minority and woman-owned business that intends to operate a number of PCS systems if it is a successful bidder in the pending C block PCS auction. With their extensive PCS networks, C block licensees may well have a real need for backhaul and backbone facilities of the kind for which the 37 and 39 GHz bands have been proposed. These licenses, which are most useful for internal, non-subscriber services, are statutorily exempt from competitive bidding, and should in any event be distributed by an alternative licensing method. If, however, the Commission does proceed with competitive bidding, a number of provisions should be included in the auction rules to protect small businesses.

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To: The Commission

COMMENTS OF DCR COMMUNICATIONS, INC.

DCR Communications, Inc. ("DCR") respectfully submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") in the above-captioned matter.^{1/}

I. THE COMMISSION IS NOT AUTHORIZED TO AND
 AS A POLICY MATTER SHOULD NOT DISTRIBUTE LICENSES IN
 THE 37 AND 39 GHZ BLOCKS BY AUCTION.

DCR is a small, minority and woman-owned business that is actively bidding for a number of licenses in the ongoing C block PCS auction. DCR has had to raise a substantial amount of money even to participate in the auction, and will have to come forward with even more funds if it is a successful bidder for any of the C block licenses. DCR, like other companies who have invested heavily in PCS, has a substantial interest in the potential availability and fair distribution of the 37 and 39 GHz spectrum for backhaul and backbone use. As the Commission noted,

^{1/} NPRM and Order, FCC 95-500 (released December 15, 1995).

the 39 GHz band is already in high demand, and additional 37 GHz spectrum "will be needed" to provide "spectrum for broadband PCS infrastructure . . . [and] cellular and other commercial and private mobile radio operations."^{2/}

The Commission's auction authority is codified in Section 309(j) of the Communications Act, added by the 1993 Omnibus Budget Reconciliation Act. Under Section 309(j)(2), auctions are appropriate for spectrum licenses only if two conditions are met. First, Congress required that "the principal use of such spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers in return for" enabling those subscribers to receive or transmit signals. Second, auctioning the spectrum must promote the objectives outlined in Section 309(j)(3). These include (A) development and deployment of new technologies; (B) promoting economic opportunity and disseminating licenses among a wide variety of applicants; (C) public recovery of the value of spectrum made available for commercial use and avoidance of unjust enrichment; and (D) efficient use of the spectrum.

Congress made clear that auctions are not permissible unless the "principal" use of the spectrum is to "resell the spectrum to subscribers." H.R. Rep. No. 111, 103d Cong., 1st Sess. 253 (1993). The 37 and 39 GHz bands, which will not provide service to be resold but will be used to provide CMRS

^{2/}

Id. ¶ 13.

carriers with "intermediate links," therefore do not appear to "involve" resale to subscribers.^{3/} The Commission's earlier proposal suggesting otherwise^{4/} was never revisited in the Second Report and Order^{5/} and was not supported by the commenters, who overwhelmingly rejected auctioning intermediate links.^{6/}

As the Commission itself notes,^{7/} it agreed with these comments and refused to subject intermediate links used for backhaul and other such purposes to competitive bidding.^{8/} As the Commission concluded, auctioning intermediate links might "lead to significant delays in the provision of services . . . [and] impose significant administrative costs on licensees and on the Commission, particularly relative to the likely value of these licenses."^{9/}

^{3/} Although the Commission proposes opening these licenses to alternate uses such as point-multipoint and mobile communications, NPRM ¶ 13, DCR believes that these high frequencies are unsuitable for most uses and thus will not be widely used on these bases.

^{4/} Competitive Bidding NPRM, 8 FCC Rcd 7635, 7639 (1993).

^{5/} 9 FCC Rcd 2348 (1994).

^{6/} Id. at 2355.

^{7/} NPRM ¶ 27.

^{8/} Second Report and Order, 9 FCC Rcd 2348, 2355-56; recon., 9 FCC Rcd 7245 (1994).

^{9/} Id.

The Commission now asserts the opposite,^{10/} without providing any basis for its departure from its prior decision.^{11/} Yet obtaining 37 and 39 GHz licenses will not bring licensees any independent financial return or unjust enrichment. Conversely, in an auction, due to the size and number of firms that may compete, the licenses are likely to be the focus of the same fierce bidding that has characterized the PCS auctions, and will thus subject licensees to significant costs -- which may well exceed their likely value.^{12/}

Furthermore, auctions in this case will not result in dissemination of licenses among a wide variety of licensees as required under Section 309(j)(3)(B). It would be counterproductive to force small businesses to pay additional

^{10/} NPRM ¶ 28.

^{11/} "A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress From this presumption flows the agency's duty to explain its departure from prior norms," such that a reviewing court may judge the consistency of the agency's action with its mandate. Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade, 412 U.S. 800, 807-08 (1973).

^{12/} See Second Report and Order, 9 FCC Rcd at 2355-56. These costs might be much greater than otherwise if auctions were conducted in the absence of complete information by C block bidders. DCR assumes that the Commission will await the end of the C block PCS auction before commencing any licensing process for the 37 and 39 GHz bands. This is essential in order to identify C block licensees and them a reasonable opportunity to determine their need for such intermediate links. Beginning the licensing process prior to the final licensing proceedings in PCS will force some applicants to bid for licenses that they ultimately may not need, either because they do not obtain a PCS license or because they select an alternate method of backhaul and backbone communication.

sums for spectrum that may be essential in order to operate the PCS systems that have been dearly paid for at the C block auction. In an auction with participants that will doubtless include large, well-financed and established A and B block licensees, small businesses will be less likely to be able to compete in the bidding process, even with designated entity preferences.

Accordingly, DCR believes the Commission should utilize its proposed alternative licensing proposal for the 37 GHz band.^{13/} The same process should be used for the 39 GHz band.^{14/} A showing of need is appropriate to restrict license grants to those licensees that will utilize the license to provide their underlying CMRS service.^{15/} Buildout restrictions would similarly ensure that the licenses were used for these purposes. DCR would also support anti-trafficking provisions^{16/} and the

^{13/} NPRM ¶¶ 102-103.

^{14/} DCR supports the Commission's suggestion that measures should be implemented to minimize speculation among incumbent licensees in the 39 GHz band. NPRM ¶¶ 105-109. DCR also agrees that pending applications in the 39 GHz band should be held in abeyance. Id. ¶ 123. However, DCR suggests that, regardless of the rules adopted for the 39 GHz band, the freeze on license applications for that band be extended until the C block PCS auction is completed. Otherwise, PCS licensees will not have an opportunity to determine whether they have a competing need for any of the 39 GHz licenses.

^{15/} Although the alternative licensing method may not be as lucrative for the Commission, the Commission is prohibited from basing its auction decisions on the expectation of revenues for the government. 47 U.S.C. § 309(j)(7).

^{16/} NPRM ¶ 61.

proposal of requiring a report after a reasonable interim regarding the actual use of these licenses.^{17/} Finally, DCR would propose maintaining a BTA-wide service area to reflect the fact that PCS licenses are divided in this manner, but would suggest permitting licensees to partition their licenses (as discussed further, below) to ensure maximum efficiency and avoid unused areas of the license.

II. IF THE COMMISSION PROCEEDS WITH COMPETITIVE BIDDING OF THE 37 AND 39 GHZ LICENSES, IT SHOULD ENSURE SUBSTANTIAL SMALL BUSINESS AND DESIGNATED ENTITY PREFERENCES.

DCR strongly supports the Commission's decision to implement small business preferences if auctions are held for licenses in these spectrum blocks.^{18/} It is essential that small business preferences be designed to provide meaningful assistance to small businesses who apparently will compete against large, well-financed companies for the 37 and 39 GHz licenses. As described above, small businesses may be at a serious competitive disadvantage in these auctions due to the money already expended on obtaining PCS licenses. Accordingly, DCR strongly advocates

^{17/} Id. ¶ 103.

^{18/} Id. ¶¶ 73, 75. As a small business that is also minority- and woman-owned, DCR also supports adoption of preferences designed to "promote opportunities for businesses owned by minorities and women." Id. ¶ 74. However, as DCR has consistently stated in proceedings in the C block, fashioning preferences that can withstand the Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995), test should not be permitted to lead to delay in the licensing process, which would be especially harmful to minority- and woman-owned businesses attempting to attract financing and operate PCS systems.

adopting a 25 percent bidding credit, rather than the 10 percent credit proposed by the Commission.^{19/} As the Commission has recognized in the C block auction, this greater credit will more successfully achieve the goal of providing "DEs, including small businesses owned by women and minorities, with a meaningful opportunity to obtain 37 GHz licenses."^{20/} Installment and interest only payments, as proposed by the Commission, are also essential.^{21/}

DCR also believes that the bidding credit and other small business preferences will be most effectively focused if they are scaled according to a small business's financial size, as proposed by the Commission.^{22/} Eligibility for small business preferences and the financial size determination should be based on the rules applicable to the C block PCS applicants. C block applicants have expended substantial sums to structure themselves according to the C block rules. Changing the small business rules would add new administrative costs to the already significant sums involved in holding a second auction.

DCR also advocates permitting all 37 and 39 GHz companies to partition their licenses to any potential licensee

^{19/} Id. ¶¶ 78-79.

^{20/} Id. ¶ 79.

^{21/} Id. ¶¶ 81-85.

^{22/} Id. ¶¶ 80, 86.

meeting the relevant requirements.^{23/} Such a rule would assist small businesses that might be able to afford a portion of a license even if bidding for the entire license were too expensive. It would also allow small businesses to reach partitioning agreements with other small businesses, in addition to rural telephone companies, permitting more small business participation in the auction.

Finally, DCR believes unjust enrichment provisions may be more appropriate than a complete transfer prohibition for these licenses. Because need for the 37 and 39 GHz licenses may change as the technology utilized by licensees develops or deals are reached with other carriers, there should not be a total prohibition on transfer, even for small businesses. It would be far more productive to permit transfer of these licenses to ensure that the spectrum is used efficiently, as long as there are provisions against unjust enrichment. To guard against speculators, the Commission should institute and strictly enforce anti-trafficking provisions. If, however, the Commission does institute a no-transfer rule, DCR suggests that the Commission clarify that, as with all such transfer prohibitions, pro-forma transfers are permitted.

^{23/}

Id. ¶ 90.

CONCLUSION

DCR supports the Commission's efforts to open the 37 GHz band for backhaul and backbone CMRS uses, and to protect licensees from speculation in the 39 GHz band. However, for the reasons set forth above, DCR does not believe that auctions are the appropriate method of ensuring these outcomes, and believes that small businesses should be accommodated regardless of the licensing method the Commission adopts.

Respectfully submitted,


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Lynn R. Charytan

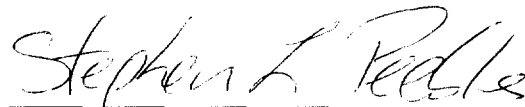
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March 4, 1996

CERTIFICATE OF SERVICE

I, Stephen L. Peebles, hereby certify that I have this 4th day of March, 1996, cause to be delivered by hand copies of the foregoing " Comments of DCR Communications, Inc." to the names on the attached service list.


Stephen L. Peebles

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